



SMALL BUSINESS ADMINISTRATION

13 CFR Parts 126 and 134

RIN 3245-AH88

HUBZone Appeal Process

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The U.S. Small Business Administration (SBA) is amending its regulations to implement a provision of the National Defense Authorization Act for Fiscal Year 2022. This final rule provides procedures for SBA's Office of Hearings and Appeals to hear appeals from protest determinations regarding the status of a concern as a certified HUBZone small business concern.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. It applies to all appeals filed on or after that date.

FOR FURTHER INFORMATION CONTACT: Laura Maas, HUBZone Program, laura.maas@sba.gov, 202-205-7341. This phone number may also be reached by individuals who are deaf or hard of hearing, or who have speech disabilities, through the Federal Communications Commission's TTY-Based Telecommunications Relay Service teletype service at 711.

SUPPLEMENTARY INFORMATION: Section 864 of the National Defense Authorization Act for Fiscal Year 2022 (NDAA 2022) authorized the U.S. Small Business Administration's (SBA) Office of Hearings and Appeals (OHA) to decide all appeals from HUBZone status protest determinations, which are currently decided by SBA's Associate Administrator of Government Contracting and Business Development. Section 864 also required SBA to publish a rule implementing this authority. SBA

published a proposed rule on December 15, 2022. 87 FR 76585. SBA did not receive any comments on the proposed rule. Accordingly, this final rule implements the changes as proposed.

The final rule revises the HUBZone regulations at 13 CFR 126.805 to specify that HUBZone appeals are processed by OHA in accordance with the procedures in part 134. The final rule also amends the regulations pertaining to OHA's jurisdiction at subparts A and B of 13 CFR part 134 to include appeals from HUBZone status protest determinations. Finally, the final rule creates a new subpart M in 13 CFR part 134 to set out the rules of practice for appeals from HUBZone status protest determinations.

Section-by-Section Analysis

A. Section 126.103

This final rule amends the HUBZone regulations at § 126.103 by deleting the definition for "AA/GC&BD" which is the Associate Administrator for Government Contracting and Business Development. The only references to this role in the HUBZone regulations are in relation to deciding appeals of HUBZone status protest determinations, and the Associate Administrator for Government Contracting and Business Development will no longer have this responsibility. SBA notes that "AA/GCBD" also appears several times in the regulations, and this final rule removes all references to both "AA/GC&BD" and "AA/GCBD" in Part 126. This final rule also deletes the definition for "DAA/GC&BD" because this term does not appear anywhere else in Part 126.

B. Sections 126.309, 126.803(e)

This final rule amends the §§ 126.309 and 126.803(e) to reference appeal decisions made by OHA rather than appeal decisions made by the AA/GCBD.

C. Section 126.805

The final rule revises §126.805, which addresses the procedures for appeals of HUBZone status protest determinations, to provide that such appeals may be filed in accordance with part 134 of title 13 of the Code of Federal Regulations.

D. Sections 134.102, 134.201(b)

The final rule amends § 134.102 by adding a new paragraph (x), to add appeals from HUBZone status protest determinations, as a new type of proceeding over which OHA has jurisdiction.

The final rule amends § 134.201(b) by adding a new paragraph (10) to include appeals from HUBZone status protest determinations. As a result of this new paragraph, existing § 134.201(b)(10) has been redesignated as § 134.201(b)(11).

E. Part 134 Subpart M

The final rule creates a new subpart M to cover the procedures for filing appeals of HUBZone status protest determinations.

Section 134.1301 provides that appeals under this new subpart include any of the grounds for a HUBZone status protest specified in § 126.801 of this chapter, as well as appeals from dismissals of HUBZone status protests by the D/HUB based on a finding that the protest was premature, untimely, nonspecific, not based upon protestable allegations, moot, or not filed by an interested party. This section also provides that the provisions of subparts A and B of part 134 apply to appeals of HUBZone status protest determinations. Finally, this section provides that appeals from HUBZone status protest determinations are separate from appeals from size determinations.

Section 134.1302 establishes standing to file an appeal from a HUBZone status protest determination.

Section 134.1303 provides that an appeal from a HUBZone status protest determination must be filed within ten (10) business days after the appellant receives the protest determination.

Section 134.1304 provides that if a timely appeal of a HUBZone status protest determination is filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered. This section also provides that where an appeal is filed before contract award, the contracting officer must withhold award until the appellate decision is rendered, unless the contracting officer has determined that award and performance of the contract is in the best interests of the government.

Section 134.1305 provides that an appeal petition must include the following: a copy of the protest determination; the date the appellant received the protest determination; a statement that the petitioner is appealing a HUBZone status protest determination issued by the D/HUB; a full and specific statement as to why the HUBZone status protest determination is alleged to be based on a clear error of fact or law, together with argument supporting such allegation; the solicitation number, the contract number (if applicable), and the name, address, and telephone number of the contracting officer; and the name, address, telephone number, facsimile number, and signature of the appellant or its attorney. This section also provides that the appellant must serve copies of the appeal upon the D/HUB, the contracting officer, protested concern or the protester, and SBA's Associate General Counsel for Procurement Law, and that all appeal petitions must include a certificate of service. OHA may dismiss appeal petitions that do not meet all the requirements of § 134.1305.

Section 134.1306 states that the provisions in § 134.204, regarding the service and filing requirements of all pleadings and submissions, apply to appeals from HUBZone status protest determinations unless otherwise indicated.

Section 134.1307 requires the D/HUB to send OHA the entire case file relating to the protest decision upon receipt of an appeal petition.

Section 134.1308 provides that the standard of review for an appeal of a HUBZone status protest determination is whether the D/HUB's determination was based on clear error of fact or law. This section also provides that the appellant bears the burden of proof by a preponderance of the evidence.

Section 134.1309 provides that an appeal from a HUBZone status protest determination will be dismissed if the appeal is untimely under § 134.1303, or if the matter has been decided or is the subject of adjudication before a court of competent jurisdiction over such matters.

Section 134.1310 states that responses to an appeal are to be filed within fifteen (15) business days after service of the appeal petition.

Section 134.1311 states that there will not be discovery or oral hearings in appeals from HUBZone status protest determinations.

Section 134.1312 prohibits new evidence in appeals from HUBZone status protest determinations.

Section 134.1313 provides that the record for a HUBZone status protest appeal will close when the time to file a response to an appeal petition expires.

Section 134.1314 provides that OHA will decide an appeal within forty-five (45) calendar days after the close of record.

Section 134.1315 provides that OHA's decision in an appeal from a HUBZone status protest determination is the final agency decision and provides that the effects of the decision on the procurement at issue are explained in 13 CFR 126.803(e).

Section 134.1316 provides that OHA may reconsider an appeal decision within twenty (20) calendar days after the decision is issued, or OHA may remand a proceeding to the D/HUB for a new HUBZone status protest determination.

Compliance With Executive Orders 12866, 12988, 13132, and the Paperwork

**Reduction Act (44 U.S.C. Ch. 35), the Regulatory Flexibility Act (5 U.S.C. 601-612),
the Congressional Review Act ((5 U.S.C. 801–808)**

Executive Order 12866

The Office of Management and Budget has determined that this rule is not a “significant regulatory action” under Executive Order No. 12866. This rule amends the rules of practice for the SBA’s OHA to implement procedures for appeals from HUBZone status protest determinations. As such, the rule has no effect on the amount or dollar value of any federal contract requirements or of any financial assistance provided through SBA. Therefore, the rule is not likely to have an annual economic effect of \$100 million or more, result in a major increase in costs or prices, or have a significant adverse effect on competition or the United States economy. In addition, this rule does not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency, materially alter the budgetary impact of entitlements, grants, user fees, loan programs or the rights and obligations of such recipients, nor raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

Executive Order 12988

This action meets applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

This rule does not have Federalism implications as defined in Executive Order 13132. It does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and

responsibilities among the various levels of government, as specified in the Executive Order. As such, it does not warrant the preparation of a Federalism Assessment.

Paperwork Reduction Act

The SBA has determined that this rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, as amended (RFA), 5 U.S.C. 601-612, requires federal agencies to prepare an initial regulatory flexibility analysis (IRFA) to consider the potential impact of the regulations on small entities. Small entities include small businesses, small not-for-profit organizations, and small governmental jurisdictions. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an IRFA, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

This rule revises the regulations governing cases before SBA's OHA, SBA's administrative tribunal. These regulations are procedural by nature. Specifically, the rule establishes rules of practice for the SBA's OHA to hear appeals from HUBZone status protest determinations. While did not receive any comments from any small business indicating that they would be affected by it economically. Therefore, the Administrator of SBA certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

Congressional Review Act, 5 U.S.C. Ch. 8

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, also known as the Congressional Review Act or CRA, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. SBA will submit a report containing this rule and other

required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the CRA cannot take effect until sixty (60) days after it is published in the *Federal Register*. The Office of Information and Regulatory Affairs has determined that this rule is not a “major rule” as defined by 5 U.S.C. 804(2). Therefore, this rule is not subject to the 60-day restriction.

List of Subjects

13 CFR Part 126

Administrative practice and procedure, Government procurement, Penalties, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 134

Administrative practice and procedure, Claims, Equal access to justice, Lawyers, Organization and function (Government agencies).

For the reasons set forth in the preamble, SBA amends parts 126 and 134 of title 13 of the Code of Federal Regulations as follows:

PART 126—HUBZONE PROGRAM

1. The authority citation for part 126 is revised to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p), 644 and 657a.

§ 126.103 [Amended]

2. Amend § 126.103 by removing the definitions of “AA/GC&BD” and “DAA/GC&BD”.

§ 126.309 [Amended]

3. Amend § 126.309 by removing “(the D/HUB’s decision if no appeal is filed or the decision of the AA/GC&BD)” and adding in its place “(*i.e.*, the D/HUB’s decision if the protest determination is not appealed, or OHA’s decision if the protest determination is appealed)”.

4. Amend § 126.803 by:

- a. Revising paragraph (e) introductory text;
- b. Removing “the AA/GCBD” and adding in its place “OHA” in paragraph (e)(1)(ii)(B);
- c. Removing “(*i.e.*, the D/HUB’s decision if no appeal is filed, or the decision of the AA/GCBD if the protest is appealed)” and adding in its place “(*i.e.*, the D/HUB’s decision if the protest determination is not appealed, or OHA’s decision if the protest determination is appealed)” in paragraph (e)(1)(iii);
- d. Removing “the AA/GCBD” and adding in its place “OHA” In paragraph (e)(2)(ii); and
- e. Removing “(the D/HUB’s decision if no appeal is filed, or the decision of the AA/GCBD if the protest is appealed)” and adding in its place “(*i.e.*, the D/HUB’s decision if the protest determination is not appealed, or OHA’s decision if the protest determination is appealed)” in paragraph (e)(3).

The revision reads as follows:

§ 126.803 How will SBA process a HUBZone status protest and what are the possible outcomes?

* * * * *

(e) *Effective of determination.* The determination is effective immediately and is final, unless overturned on appeal by SBA’s Office of Hearings and Appeals (OHA) pursuant to part 134 of this chapter.

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5. Revise § 126.805 to read as follows:

§ 126.805 What are the procedures for appeals of HUBZone status protest determinations?

The protested concern, the protester, or the contracting officer may file an appeal of a HUBZone status protest determination with SBA’s Office of Hearings and Appeals (OHA) in accordance with part 134 of this chapter.

PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

6. The authority citation for part 134 is revised to read as follows:

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 634(i), 637(a), 648(l), 656(i), 657a, 657t and 687(c); 38 U.S.C. 8127(f); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

Subpart J issued under 38 U.S.C. 8127(f)(8)(B).

Subpart K issued under 38 U.S.C. 8127(f)(8)(A).

Subpart L issued under 15 U.S.C. 636(a)(36); Pub. L. 116-136; Pub. L. 116-139; 116-142; 116-147.

Subpart M issued under 15 U.S.C. 657a; Pub. L. 117-81.

7. Amend § 134.102 by:

a. Removing the word “and” at the end of paragraph (v);

b. Removing the period at the end of paragraph (w) and adding “; and” in its place; and

c. Adding paragraph (x).

The addition to read as follows:

§ 134.102 Jurisdiction of OHA.

* * * * *

(x) Appeals from HUBZone status protest determinations under part 126 of this chapter.

8. Amend § 134.201 by:

a. Removing the word “and” at the end of paragraph (b)(9);

b. Redesignating paragraph (b)(10) as paragraph (b)(11); and

c. Adding a new paragraph (b)(10).

The addition reads as follows:

§ 134.201 Scope of the rules in this subpart.

* * * * *

(b) * * *

(10) For appeals of protest determinations regarding the status of a concern as a certified HUBZone small business concern, in subpart M of this part; and

* * * * *

8. Add subpart M to read as follows:

Subpart M—Rules of Practice for Appeals of Protest Determinations Regarding the Status of a Concern as a Certified HUBZone Small Business Concern

Sec.

- 134.1301 What is the scope of the rules in this subpart?
- 134.1302 Who may appeal a HUBZone status protest determination?
- 134.1303 What time limits apply to filing an appeal from a HUBZone status protest determination?
- 134.1304 What are the effects of the filing of an appeal on the procurement at issue?
- 134.1305 What are the requirements for an appeal petition?
- 134.1306 What are the service and filing requirements?
- 134.1307 What are the requirements for transmitting the protest file?
- 134.1308 What is the standard of review?
- 134.1309 When will a Judge dismiss an appeal?
- 134.1310 Who can file a response to an appeal petition and when must such a response be filed?
- 134.1311 Will the Judge permit discovery and oral hearings?
- 134.1312 What are the limitations on the introduction of new evidence?
- 134.1313 When is the record closed?
- 134.1314 When must the Judge issue the decision?
- 134.1315 What are the effects of the Judge's decision on the procurement at issue?
- 134.1316 Can a Judge reconsider an appeal decision?

Subpart M—Rules of Practice for Appeals of Protest Determinations Regarding the Status of a Concern as a Certified HUBZone Small Business Concern

§ 134.1301 What is the scope of the rules in this subpart?

(a) The rules of practice in this subpart apply to all appeals to OHA from formal protest determinations made by the Director of SBA's Office of HUBZone (D/HUB) in connection with a HUBZone status protest. Appeals under this subpart include any of the grounds for a HUBZone status protest specified in § 126.801 of this chapter, as well as appeals from dismissals of HUBZone status protests by the D/HUB based on a finding

that the protest was premature, untimely, nonspecific, not based upon protestable allegations, moot, or not filed by an interested party.

(b) Except where inconsistent with this subpart, the provisions of subparts A and B of this part apply to appeals listed in paragraph (a) of this section.

(c) Appeals relating to formal size determinations and NAICS Code designations are governed by subpart C of this part.

§ 134.1302 Who may appeal a HUBZone status protest determination?

Appeals from HUBZone status protest determinations may be filed with OHA by the protested concern, the protester, or the contracting officer responsible for the procurement affected by the protest determination.

§ 134.1303 What time limits apply to filing an appeal from a HUBZone status protest determination?

Appeals from a HUBZone status protest determination must be commenced by filing and serving an appeal petition within ten (10) business days after the appellant receives the HUBZone status protest determination (*see* § 134.204 for filing and service requirements). OHA shall dismiss any untimely appeal.

§ 134.1304 What are the effects of the filing of an appeal on the procurement at issue?

(a) If a timely appeal is filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.

(b) If a timely appeal is filed before contract award, the contracting officer must withhold award until the appellate decision is rendered, unless the contracting officer has determined that award and performance of the contract is in the best interests of the government.

§ 134.1305 What are the requirements for an appeal petition?

(a) *Format.* An appeal from a HUBZone status protest determination must be in writing. There is no required format for an appeal petition. However, it must include the following information:

- (1) A copy of the protest determination;
- (2) The date the appellant received the protest determination;
- (3) A statement that the petitioner is appealing a HUBZone status protest determination issued by the D/HUB;
- (4) A full and specific statement as to why the HUBZone status protest determination is alleged to be based on a clear error of fact or law, together with argument supporting such allegation;
- (5) The solicitation number, the contract number (if applicable), and the name, address, and telephone number of the contracting officer; and
- (6) The name, address, telephone number, facsimile number, and signature of the appellant or its attorney.

(b) *Service of appeal.* Concurrent with filing the appeal with OHA (OHAFilings@sba.gov), the appellant must serve copies of the entire appeal petition upon each of the following:

- (1) The D/HUB at hzappeals@sba.gov;
- (2) The contracting officer responsible for the procurement affected by a HUBZone determination;
- (3) The protested concern (the business concern whose HUBZone status is at issue) or the protester; and
- (4) SBA's Office of General Counsel, Associate General Counsel for Procurement Law at OPLservice@sba.gov.

(c) *Certificate of service.* The appellant must attach to the appeal petition a signed certificate of service meeting the requirements of § 134.204(d).

(d) *Dismissal*. An appeal petition that does not meet all the requirements of this section may be dismissed by the Judge on the Judge's own initiative or upon motion of a respondent.

§ 134.1306 What are the service and filing requirements?

The provisions of § 134.204 apply to the service and filing of all pleadings and other submissions permitted under this subpart, unless otherwise indicated in this subpart.

§ 134.1307 What are the requirements for transmitting the protest file?

Upon receipt of an appeal petition, the D/HUB will send to OHA a copy of the protest file relating to that determination. The D/HUB will certify and authenticate that the protest file, to the best of the D/HUB's knowledge, is a true and correct copy of the protest file.

§ 134.1308 What is the standard of review?

The standard of review for an appeal of a HUBZone status protest determination is whether the D/HUB's determination was based on clear error of fact or law. The appellant has the burden of proof, by a preponderance of the evidence.

§ 134.1309 When will a Judge dismiss an appeal?

The presiding Judge must dismiss the appeal if:

- (a) The appeal is untimely filed under § 134.1303;
- (b) The appeal does not, on its face, allege facts that if proven to be true, warrant reversal or modification of the determination; or
- (c) The matter has been decided or is the subject of adjudication before a court of competent jurisdiction over such matters; however, once an appeal has been filed, initiation of litigation of the matter in a court of competent jurisdiction will not preclude the Judge from rendering a final decision on the matter.

§ 134.1310 Who can file a response to an appeal petition and when must such a response be filed?

(a) *Who may respond.* Although not required, any person served with an appeal petition may file and serve a response supporting or opposing the appeal if he or she wishes to do so. The response should present arguments related to the issues presented on appeal.

(b) *Time limits.* If a person decides to file a response, the response must be filed within fifteen (15) business days after service of the appeal petition.

(c) *Service.* The respondent must serve its response upon the appellant and upon each of the persons identified in the certificate of service attached to the appeal petition pursuant to § 134.1305.

(d) *Reply to a response.* No reply to a response will be permitted unless the Judge directs otherwise.

§ 134.1311 Will the Judge permit discovery and oral hearings?

Discovery will not be permitted, and oral hearings will not be held.

§ 134.1312 What are the limitations on the introduction of new evidence?

The Judge may not admit evidence beyond the written protest file nor permit any form of discovery. All appeals under this subpart will be decided solely on a review of the evidence in the written protest file, arguments made in the appeal petition, and response(s) filed thereto.

§ 134.1313 When is the record closed?

The record will close when the time to file a response to an appeal petition expires pursuant to § 134.1310.

§ 134.1314 When must the Judge issue the decision?

The Judge shall issue a decision, insofar as practicable, within forty-five (45) calendar days after close of the record.

§ 134.1315 What are the effects of the Judge's decision on the procurement at issue?

The Judge's decision is the final agency decision and becomes effective upon issuance. For the effects of the decision on the procurement at issue, *see* § 126.803(e) of this chapter.

§ 134.1316 Can a Judge reconsider an appeal decision?

(a) Any party who has appeared in the proceeding, or SBA, may request reconsideration of the OHA appeal decision by filing with the Judge and serving a petition for reconsideration on all the parties to the appeal within twenty (20) calendar days after service of the written decision. The request for reconsideration must clearly show an error of fact or law material to the decision. The Judge may also reconsider a decision on the Judge's own initiative, within twenty (20) calendar days after issuance of the written decision.

(b) The Judge may remand a proceeding to the D/HUB for a new HUBZone status protest determination if the D/HUB fails to address issues of decisional significance sufficiently, does not address all the relevant evidence, or does not identify specifically the evidence upon which it relied. Once remanded, OHA no longer has jurisdiction over the matter, unless a new appeal is filed as a result of the new HUBZone status protest determination.

Isabella Casillas Guzman,
Administrator.

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